IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*, ***Plaintiffs,*** ***v.*** **TYSON FOODS, INC., *et al.*,** ***Defendants.***	**Case No. 4:05-cv-00329-GKF-SAJ**

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR ADDITIONAL TIME TO RESPOND TO DEFENDANTS' MOTION TO DISMISS (DKT #1795)

Defendants respectfully submit this response in opposition to Plaintiffs' Motion for Additional Time to Respond (Dkt #1795, Nov. 7, 2008) ("Plaintiffs' Motion"), to Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law based on Lack of Standing (Dkt #1788, Oct. 31, 2008) ("Motion to Dismiss").

Defendants have no objection to a reasonable ten-day extension of time. However, Defendants oppose Plaintiffs' extraordinary request that they be allowed 45 days to respond to a motion raising important legal claims of which Plaintiffs have long been aware and which were Plaintiffs' obligation to address, yet which they have steadfastly ignored. Defendants also object to Plaintiffs' unfounded allegation that Defendants delayed their filing to gain some tactical advantage. Plaintiffs have known about the claims of the Cherokee Nation since before this lawsuit began, yet they have ignored the Nation's rights, claimed the Nation's natural resources as their own, and have attempted to shift to Defendants the burden of raising the issues addressed

in the Motion to Dismiss. The Motion to Dismiss raises important questions of law which Plaintiffs had an obligation to address and which can no longer be substantially delayed.

I. PLAINTIFFS HAVE LONG KNOWN THAT THE CHEROKEE NATION IS A REQUIRED PARTY IN THIS CASE

Plaintiffs' request for an extraordinary extension relies principally on a purported need for additional time to research the basis on which each count of their Complaint might continue, and to "carefully marshal [the] history" related to the treaties and laws underlying Defendants' assertion that the Cherokee Nation must be joined as a required party. Pls.' Mot. at ¶¶ 2-3. Notably, Plaintiffs do not claim surprise or otherwise assert that Defendants' Motion to Dismiss raises novel or unanticipated legal claims. Nor could they, because Plaintiffs have long known of the Cherokee Nation's claims of ownership and sovereign trusteeship. *See* Defs.' Mot. at 15-20. Those claims draw into question the very bases for Plaintiffs' suit and Plaintiffs should have addressed them before filing the complaint. Plaintiffs' current efforts are therefore tardy, and should not be excused with an unduly long extension.

The State of Oklahoma has known for decades that the Cherokee Nation has consistently claimed ownership and trusteeship of the natural resources in the Illinois River Watershed ("IRW") under rights established pursuant to federal law. For example, prior to the filing of this lawsuit, the Cherokee Nation objected strenuously to any requirement that its water rights in the IRW be subject to approval by any Oklahoma State agency:

> The Cherokee Nation has water rights that existed before Oklahoma became a state. These water rights were established under federal laws and treaties, and they were unaffected by statehood. The Cherokee Nation's water rights are not now, nor have they ever been, subject to any state law.

Apr. 20, 2004 Ltr. from Cherokee Nation to Col. Robert L. Suthard, Jr. (Dkt #1788, Exh. 7).[1] Indeed, Plaintiff Miles Tolbert noted the Cherokee Nation's claims of title and trusteeship during the preliminary injunction hearing in this matter. *See* Feb. 19, 2008 PI Hearing Tr. at 153:21-154:4 (Dkt #1788, Exh. 1) ("I think it's fair to say that there are some members of the Cherokee Nation who think they have a claim to the water" [but] "I think the State has ownership").[2]

Given their ample and timely notice of the Cherokee Nation's claims, it is surprising that Plaintiffs are only just now "[r]esearching these [treaties and laws relating to the Cherokee Nation's long-standing claim of ownership and trusteeship of the natural resources that lie at the heart of this matter], as well as setting out the basis on which this matter can and should proceed on all counts without joining the Cherokee Nation." Pls.' Mot. at ¶ 2. At the outset of this case, the Federal Rules required Plaintiffs to join all parties necessary to their lawsuit or to state the reason why any required party was not joined. *See* Fed. R. Civ. P. 19(c). Courts have been unforgiving to Plaintiffs who remain silent as to absent required parties in order to avoid raising jurisdictional doubt about their claims. *See, e.g., Televisa, S.A. de C.V. v. Koch Lorber Films*, 382 F. Supp. 2d 631, 634 (S.D.N.Y. 2005) ("[H]aving failed to comply with its obligation to explain in its pleadings why it did not join parties who, on the face of the pleadings, have an

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[1] *See also* Aug. 19, 2004 Ltr. from Cherokee Nation to Lt. Gen. Robert B. Flowers (Dkt #1788, Exh. 7) (same); Travis Snell, *Tribe Claims Water Storage on Lake Tenkiller, Corps Disagrees*, Cherokee Phoenix & Indian Advocate (June 2004) (reporting that the Cherokee asserted ownership "to the waters of northeast Oklahoma," including Lake Tenkiller).

[2] The significance of the Cherokee Nation's claims is doubtlessly not lost on the State of Oklahoma, as throughout the past century the Supreme Court has continually upheld Native American Tribes' "inherent sovereign authority over their members and territories" while denying the State's claims of ownership or trusteeship over the lands and other natural resources held by the Tribes under federal laws and treaties. *Oklahoma Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *see, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970); *Grand River Dam Auth.*, 363 U.S. 229, 237-38 (1960); *Brewer-Elliott Oil & Gas v. United States*, 260 U.S. 77, 87-88 (1922); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); Defs.' Mot. at 11 (citing cases).

obvious interest in this matter, see Fed. R. Civ. P. 19(c), plaintiff must suffer an adverse inference on this score.").[3] The law is clear that the Cherokee Nation's claim renders it a required party. *See Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999) ("Rule 19 . . . does not require the absent party to actually *possess* an interest; it requires the movant to show that the absent party '*claims an interest* relating to the subject of the action.'") (emphasis in original); Defs.' Mot. at 16-19. Yet, despite being aware of the Nation's claims, Plaintiffs apparently made no effort to join the Nation or even to research the Nation's claims.

Aside from Rule 19(c)'s requirement that Plaintiffs join all parties with an interest in the case, the doctrine of standing requires that Plaintiffs demonstrate that each of their claims seeks to recover for an injury to Plaintiffs' own legally protected interests. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Cherokee Nation's claims, if correct, mean that Plaintiffs have no cognizable interest in the allegedly injured waters and natural resources. Yet again, despite being aware of the Cherokee Nation's claims, the State now asserts that it has made no effort to "marshal the history" behind the State's purported rights to assure itself and the Court that a basis exists for its suit. Pls.' Mot. at ¶ 3.

Nowhere does Plaintiffs' Motion explain their failure to comply with Rule 19(c) or the requirements of demonstrating standing. Their request for a 27-day extension to do now what they should have done three years ago is therefore unsupported and unjustified. Plaintiffs' tardiness should not be rewarded with an unduly long extension.

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[3] *See also Stevens v. Loomis*, 334 F.2d 775, 779 n.1 (1st Cir. 1964) ("We are engaged in a lawsuit, not in a poker game, and if plaintiff chooses not to [name other interested parties] particularly where she was obligated to do so by F.R.Civ.P. 19(c), we will assume that there are other beneficiaries who, if joined, would destroy diversity."); *Poling v. K. Hovnanian Enterprises*, 99 F. Supp. 2d 502, 517 n. 16 (D.N.J. 2000) (same); *Hinsdale v. Farmers Nat. Bank and Trust Co.*, 93 F.R.D. 662, 665 (D.C. Ohio 1982) (same).

II. DEFENDANTS DID NOT UNDULY DELAY FILING THE MOTION TO DISMISS

Plaintiffs devote the bulk of their Motion to suggesting that Defendants acted improperly in filing their Motion to Dismiss. Defendants' motion was neither improperly filed, nor timed to gain some unspecified tactical advantage.

First, Defendants' Motion to Dismiss was not untimely under the Federal Rules. The Rules provide explicitly that a "person may be added as a party at any stage of the action on motion or on the court's initiative; and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits." Fed. R. Civ. P. 19 (1966 Amendment annotations); *see* Fed. R. Civ. P. 12(h)(2). Indeed, "the absence of an indispensable party is considered to be so significant a defect that most courts have indicated that it may be raised for the first time subsequent to the trial or on appeal." 7 Fed. Prac. & Proc. Civ. 3d § 1609 n. 25 (2008) (listing authorities); *see Davis*, 192 F.3d at 962 n. 13 ("Although it was not properly before the district court, the issue of indispensability is not waivable and may be raised on the first time on appeal"); *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1383 (10th Cir. 1997) ("We agree that the issue of indispensability can be raised at any time."). Further, the Supreme Court recently underscored the importance of not proceeding with a suit in the absence of a sovereign party whose interests may be undermined. *See Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2189-92 (2008) (finding that the principles of sovereign immunity are "much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection"). Defendants' motion was therefore timely.

Second, Defendants' Motion to Dismiss has in no way prejudiced Plaintiffs. In any case as complex as this, the litigation calendar will always provide patchwork support for the sort of

charges Plaintiffs levy. *See* Pls.' Mot. at ¶¶ 5-7. But, as the Court well knows, both sides have been occupied with expert and fact discovery, and with briefing various motions on numerous issues. No party has been prejudiced in their trial preparations, as the trial remains almost a year into the future. Indeed, summary judgment motions have yet to be filed. Thus, this case does not present any of the instances of extreme delay and prejudice under which Rule 19 motions have been denied. *See, e.g., Amerada Hess Corp. v. Diamond Servs. Corp.*, 1995 U.S. App. LEXIS 30946, 10-12 (10th Cir. 1995) (dismissing motion where Defendant failed to raise the Rule 19 defense concerning a party's absence until the close of Plaintiffs' case at trial). Plaintiffs themselves admit that the Motion to Dismiss does not disrupt the litigation calendar. As Plaintiffs note, the scheduled Fall 2009 trial date allows plenty of time for this Motion to "be argued and disposed of well in advance of trial." Pls.' Mot. at 3. Plaintiffs nowhere identify the tactical advantage Defendants purportedly gained by delaying their motion.

Third, since the inception of this suit, Defendants have put Plaintiffs on notice that the Cherokee Nation's interests would be at issue. For example, in answering Plaintiffs' First Amended Complaint, Defendant Peterson Farms, Inc. explicitly "denie[d] that the State has an interest in the waters and natural resources located within the IRW, which stands in derogation of the sovereign rights of certain Indian Tribes including, but not limited to, the Cherokee Nation." Def. Peterson Farms, Inc.'s Answer to First Am. Compl., at ¶¶ 5, 87, 99, 110, 120 (Oct. 3, 2005) (attached as Exh. A). Similarly, Defendants Tyson Foods, Inc., et al., Willow Brook Foods, Inc. and Cal-Maine Foods, Inc., et al., specifically noted that Plaintiffs failed to join indispensable parties and lacked standing to pursue claims "with respect to 'natural resources' owned or held in trust for Indian Tribes." Answer and Affirmative Defenses of Defs. Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. to the First Am. Compl., at 27 (Oct.

3, 2005) (attached as Exh. B); Answer of Willow Brook Foods, Inc. to First Am. Compl., at 19, 22 (Oct. 3, 2005) (attached as Exh. C); Answer and Affirmative Defenses of Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. to Pls.' First Am. Compl., at 26 (Oct. 4, 2005) (attached as Exh. D). More recently, Defendant Tyson Foods, Inc., et al., requested the production of "all documents . . . relating to any negotiations, conferences, meetings, workshops, memoranda of understanding, agreements, treaties, or compacts concerning natural resources or water rights between or with the State of Oklahoma and any Indian Tribe or Native American Tribes," specifically with respect to those "between or with the State of Oklahoma or you and the Cherokee Tribe" and those "relating to the February 2000 legal opinion (including the legal opinion itself) of the law firm of Ryley, Carlock, and Applewhite regarding water rights claims made by the Indian Tribes." Def. Tyson Foods, Inc.'s June 26, 2008 Requests for Production of Documents to Plaintiffs, Nos. 1-3 (attached as Exh. E).

Although the State of Oklahoma has taken great pains to avoid this issue, the approaching date for the filing of summary judgment motions and the scheduled commencement of trial within the next calendar year require that this issue be addressed now, before this case proceeds any further. Otherwise, any adjudication of the claims in this case will impair or impede the Cherokee Nation's rights, while also opening the Defendants and the courts to the risk of multiple and inconsistent judgments. *See* Defs.' Mot. at 15-19.

In sum, the legal issues addressed in the Motion to Dismiss are new to Defendants (who are private parties), but not to the State, which has long fought with the Cherokee Nation over which of them is the true owner and trustee of the IRW's natural resources. Plaintiffs have been tardy in addressing the Cherokee Nation's rights in this case. Instead, Plaintiffs appear to have been content to wait to see whether Defendants or the Court would realize the extent to which

Plaintiffs' allegations of ownership or trusteeship are the subject of a decades-old dispute between the State of Oklahoma and the Cherokee Nation. Plaintiffs' delay should not be rewarded with a lengthy extension.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Plaintiffs a ten (10) day extension to respond to the Motion to Dismiss.

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